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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 353

HENRY S. HASKINS, as Receiver for the TUSCARORA-NEVADA MINES COMPANY (a corporation),
Petitioner,

vs.

ROY F. ROSEBERRY, et al.,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

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STATEMENT.

In April, 1913 the District Court for the Southern District of New York appointed Petitioner, a citizen of New York, receiver of the Tuscarora-Nevada Mines Company, a Maine corporation (R. 156) and directed that the business of the corporation be wound up and its property and franchises be converted into money (R. 144, paragraph Seventh).

In August, 1913 the United States District Court for the District of Nevada appointed the petitioner as ancillary receiver of said company, the assets and property of which were situate in the State of Nevada (Finding of Fact IV, R. 157).

In April, 1913 the New York Court authorized the receiver to issue receiver's certificates in the amount of $75,000.00, and these certificates are outstanding and unpaid (Finding of Fact VIII, R. 160).

On July 6, 1941 the Nevada Court dismissed the Nevada proceedings (Finding of Fact V, R. 158). Two years and eight months later, Farrington, District Judge, upon the grounds of his disqualification only, vacated the order of dismissal (Finding of Fact VI, R. 158, 159), and on May 22, 1917 Judge Trippet, sitting for Judge Farrington in the Nevada Court, entered a further order vacating the order of dismissal on the ground that the same had been inadvertently made (Finding of Fact VII, R. 159, 160).

On January 28, 1927 the New York proceeding was dismissed without prejudice to a new suit. No new suit was commenced (Finding of Fact X, R. 160, 161).

On November 29, 1927 the New York Court entered an order requiring the receiver to file a final accounting within thirty days, and ordered that his bond be relieved from further liability (Exhibit No. 6, R. 146).

On February 28, 1928 the receiver filed a petition praying for his discharge and that his bond be released from liability, and on March 6, 1928 filed his account in the form of an affidavit and praying to be

relieved of further duties, and that he be relieved of liability upon his bond (Exhibit No. 6, Exhibit B, R. 146-149).

On March 6, 1928 the New York Court entered an order releasing the sureties on the bond (Finding of Fact XI, R. 161).

In the Nevada Court an order was made on January 14, 1918 directing the sale of the property. No offers were made for the property and the receiver reported no sale (Finding of Fact XII, R. 162).

Subsequent to the accounting of the receiver in 1917 and until about the year 1929, the receiver made efforts to obtain financial assistance with the view of reorganizing and/or rehabilitating the property of said receivership, and/or to obtain offers from prospective purchasers for the sale of the same. Due to the run down and deteriorated condition of the property, no offers could be obtained for the property and the receiver was unable to obtain financial assistance to enable him to operate the property on behalf of the receivership or to pay taxes or counsel fees or receiver's fees, and this condition prevailing and by reason thereof the receiver obtained the orders from the New York Court and the Nevada Court exonerating his sureties on his bond and permitting him to resign (Finding of Fact XIII, R. 162, 163).

In February of 1929 and April of 1930 the receiver reported to the Courts that since the report of June 19, 1917 he had no assets or income or property or rights of any nature except the mining claims referred

to in his report to the New York and Nevada Courts and "had no means of paying the annual assessment work or paying the taxes or looking after the protection of said mining claims" (Exhibit No. 2, R. 59, 60).

Subsequent to April 3, 1929 there were no proceeding of any kind or character in the receivership actions in either the New York or Nevada Courts until the filing by the receiver of his petition in the New York Court praying for leave to file a new bond as receiver and the filing by the receiver of his petition in the Nevada Court on December 21, 1936 praying for reinstatement as ancillary receiver of the Tuscarora-Nevada Mines Company. Said petitions were in each instance filed by Henry S. Haskins without notice to the parties to the action in either the New York or Nevada Courts and without any authority from the parties to the action.

On October 9, 1936 the New York Court authorized the filing of a new bond by Haskins as receiver of Tuscarora-Nevada Mines Company, and on December 21, 1936 the Nevada Court made an order reinstating Haskins as ancillary receiver of said company and restoring him to all the rights and powers given to him under the original order upon filing of a bond. The requisite bonds were filed in both instances (Finding of Fact XIV, R. 163, 164).

From the time of the acceptance of the resignation of the ancillary receiver by the Nevada Court until the institution of this suit, a period of more than eight years has elapsed, and from the time of the dismissal

of the suit in the New York Court more than ten years have elapsed (Finding of Fact XV, R. 164).

During this period of from eight to ten years, no action was taken in either case by the receiver or any party thereto, and there was no act or thing done by Haskins in connection with the property in controversy, and from the time of the acceptance of the resignation of the ancillary receiver by the Nevada Court said Haskins, as receiver or otherwise, never exercised any dominion over any property of Tuscarora-Nevada Mines Company owned or claimed by it in the State of Nevada, and never entered into possession or held possession of any such property (Finding of Fact XVI, R. 164, 165).

During the period between and including the years 1917 and 1922, state and county taxes of the State of Nevada and the County of Elko were levied and assessed against the Tuscarora-Nevada Mines Company upon the property in controversy. That the assessment of said property was duly equalized, as required by law, during said years and taxes thereon were levied in accordance with the laws of the State of Nevada. That for the year 1917 the first installment of taxes was paid but subsequent installments became delinquent and the property was duly sold, in accordance with law, to Elko County, Nevada on July 15, 1918, and thereafter redeemed on September 6, 1918. That the second installment of the taxes for the year 1919 levied against said property was not paid and said property hereinbefore described was sold to Security Development Company on July 19, 1920 for the amount

of said second installment of the taxes levied in that year, but was redeemed on July 18, 1921. That the taxes duly assessed and levied upon said property in controversy were not paid for the year 1921 and the property was on July 17, 1922 sold to W. F. Roseberry and Sons for the amount of the taxes and the penalties thereon in the sum of $181.23. That said property was not redeemed from said tax sale of July 17, 1922, and on July 19, 1923 a deed therefor was made, and delivered by the County of Elko, State of Nevada, through its proper officials, to W. F. Roseberry and Sons (Finding of Fact XVIII, R. 165, 166).

That said deed to W. F. Roseberry and Sons was regular in form and in accordance with the statutes of the State of Nevada, and all tax proceedings, from the assessment by the assessor up to and including the execution of said deed, were regular and in accordance with the statutes and laws of Nevada (Finding of Fact XVIII, R. 165-167).

On April 22, 1930 W. F. Roseberry executed an instrument purporting to be a deed and likewise purporting to convey to Roy F. Roseberry all of said receivership property. That ever since said date Roy F. Roseberry has remained in and upon said property, claiming to have legal possession thereof and claiming to have all the right, title and estate thereto and therein by virtue of said deeds (Complaint, paragraphs VIII and IX, R. 7, 8).

That since the execution of said tax deed the respondents and their predecessors have been in the

actual occupancy of all the property, mines and mining claims the subject of this suit, and they and their predecessors have for each year since 1923 paid all taxes levied and assessed against said property, amounting to approximately $856.00. That as respects the mining claims, the respondents and their predecessors since July 19, 1923 have been in the actual occupancy of said mines and mining claims, and the whole thereof, working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof, and ever since the said date have been in the actual occupancy of the property in controversy, being Lot 11 in Block 1 at Tuscarora, the office buildings and sampling sheds, the Tuscarora water works consisting of pipelines, ditches, etc. and water rights, and have operated the water works, maintained the pipelines, replaced the flume at the head of the pipeline, and through such water works have sold water to customers in the town of Tuscarora, Nevada, collected revenue from the sale thereof in the sum of approximately $3953.00.

That during all of said period respondents and their predecessors have occupied, held and owned said property openly, notoriously and adversely to the petitioner and all the world (Finding of Fact XIX, R. 167-169).

Respondents and their predecessors in the maintenance and operation of said water works and the protection of the water rights and the replacement of the flume at the head of the pipelines and in the operation thereof, as well as in the operation, development, pro-

tection and preservation of said mines and mining claims, have expended in excess of $57,000.00 (Finding of Fact XX, R. 169).

The receiver, in filing his petition in the New York and Nevada Courts for reinstatement and in the commencement of this action, was actuated by recent increases in the price of gold and silver which he believed would make possible a profitable operation of said properties which was not apparent or recognized by him at the time of the filing of his accounts or thereafter and until about the time when said petitions were filed in the New York and Nevada Courts (Finding of Fact XXI, R. 169).

The records of the Nevada Court do not disclose any order or direction of said Court authorizing the tax sale on June 17, 1922 at which the properties in controversy were sold for taxes to W. F. Roseberry and Sons, or authorizing the execution of a tax deed pursuant to said tax sale, and a similar situation exists as respects the New York Court (Finding of Fact XXII, R. 169, 170).

The petitioner had no actual notice of the tax sale or of the execution and delivery of the tax deed made pursuant thereto prior thereto or prior to the execution of said tax deed, except such constructive notice as may be imputed to him, until shortly before the commencement of this action (Finding of Fact XXIII, R. 170).

During the time Haskins was receiver and during the years 1917, 1918, 1919 and 1920 taxes were levied

and assessed against the property in controversy and paid by the receiver, and he also redeemed the property from sales on account of delinquent taxes for the years 1917 and 1919 (Finding of Fact XVIII, R. 165-167).

No order was made or entered by either the New York Court or the Nevada Court directing the returning or other disposition of the property which came into the hands of the receiver (Finding of Fact XXIV, R. 170, 171).

The property in controversy was in the custody and control of the receiver at the time of the tax sale to Roseberry and Sons (Finding of Fact XXV, R. 171).

At the time Geo. B. Thatcher acquired the one-half interest in the property he had actual notice of the controversy presented, and makes no claim of being an innocent purchaser (Finding of Fact XXVII, R. 172).

ARGUMENT.

THE ACTIONS IN THE NEW YORK AND NEVADA COURTS HAD BEEN DISMISSED AND THE RECEIVERSHIP TERMINATED LONG PRIOR TO THE COMMENCEMENT OF THE ACTION.

The ancillary suit in the Nevada Court was dismissed July 6, 1914, and the order of Judge Farrington of March 17, 1917 and the subsequent order of Judge Trippet of May 22, 1917 vacating the order of dismissal were void because the court had no power to vacate the judgment of dismissal and reinstate it

because the term, and indeed a number of terms, had expired when the Farrington and Trippet orders were made. See

Dillon v. U. S., 29 Fed. (2d) 246 (C.C.A. 9);
Nealon v. Davis, 18 Fed. (2d) 175.

The Farrington order of dismissal was not void because of his disqualification or because of the existence of disqualifying grounds. See

Utz & Dunn Co. v. Regulator Co., 213 Fed. 315 (C.C.A. 8).

The New York proceeding was dismissed on January 28, 1927 without prejudice to a new suit, and no new suit was ever commenced. The rule is well settled that where the primary case is dismissed the ancillary case falls with it. See

Lion Bonding & So. Co. v. Karatz, 262 U. S. 77, 67 L. Ed. 871;
Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454;
Equitable Trust Co. v. Washington-W., L. & P. Co., 300 Fed. 601;
Emerick v. Oswego Falls Pulp & Paper Co., 271 Fed. 359.

THE DISMISSALS TERMINATED THE RECEIVERSHIP AND RESTORED THE PROPERTY TO TUSCARORA-NEVADA MINES COMPANY WITHOUT THE NECESSITY OF FORMAL ORDER.

When a bill upon which the appointment is made is afterward dismissed, the duties of the receiver cease as between the parties to the action. So when defend-

ant in the action in which a receiver was appointed obtains final judgment therein, the entry of judgment would have the effect of terminating the receiver's functions. See

High on Receivers (Third Edition), Sec. 833;
Alderson on Receivers, Sec. 655, at pages 890, 891.

When the powers and duties of a receiver are at an end the property in his possession belongs to the party in whose favor judgment was rendered, who is entitled to it without further delay or order of the court. See

Alderson on Receivers, Sec. 657;
State ex rel. Oudin v. Superior Court of Spokane County, 71 Pac. 1095;
Rumney v. Donovan, 72 Pac. 305.

THE RECEIVER ABANDONED THE PROPERTY.

The record discloses not only an actual abandonment but an intent to abandon the property in controversy as an asset of the receivership. The receiver reported that he had no money to pay taxes, do assessment work, or protect or preserve the property. This was as early as April 3, 1923, and like representations were made to the Courts in 1928 and 1929. For more than ten years the receiver failed to exercise any dominion over the property and stood by without asserting his claim from 1923 until the commencement of this suit.

That a receiver can abandon assets we think is settled law, and applies equally to receivers and to trustees in bankruptcy. See

Dushane v. Beall, 161 U. S. 513, 40 L. Ed. 791;
U. S. F. & G. v. Mound Lake etc. Co., 195 So. 495;
Mesirov v. Innis Speiden & Co., 97 Atl. 160;
Remington on Bankruptcy, Vol. 2, Sec. 1158.

The rule is also settled that upon such abandonment the title revests in the owner.

Remington on Bankruptcy, Vol. 2, Sec. 1159.

AS RESPECTS SECTION 6449, NEVADA COMPILED LAWS, 1929.
(See Appendix.)

This section of the Nevada law is part of the statutory law of Nevada dealing with revenue and taxation. Similar statutes have been held to be statutes of peremption, as distinguished from statutes of prescription, and not only bar the remedy but destroy the cause of action itself, and a void deed may constitute a basis for the running of the statute of limitations. See

Jorgensen v. Thurston County, 259 Pac. 720;
Perry v. Marbury Lumber Co., 103 So. 580 (Ala.);
Dodson v. Middleton, 135 Pac. 368 (Okla.);
Jones v. Logan, 108 Pac. 81 (Kans.);
O'Keefe v. Behrens, 85 Pac. 555 (Kans.);
Hollingsworth v. Schanland, 99 So. 613.

It has also been held that a tax deed to property in the hands of a trustee in bankruptcy was none the less sufficient to start the statute of limitations running against the trustee. See the opinion of Judge Van Devanter in

In re Eppstein, 156 Fed. 42.

AS RESPECTS SECTION 8512, NEVADA COMPILED LAWS, 1929

which provides:

> "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it shall appear:
>
> 1. That it has been protected by a substantial inclosure; or,
>
> 2. That it has been cultivated or improved in accordance with the usual and ordinary methods of husbandry."

This section does not have the effect, nor should it be construed, as urged by petitioner. It merely creates a presumption of legal title, and that the occupation by any person other than the legal holder of the title is subordinate unless it appears that the property was protected by an enclosure or is cultivated or improved by ordinary methods of husbandry. This presumption must give way to the evidence and facts, which here

conclusively show that neither the Tuscarora-Nevada Mines Company nor the receiver have been in possession of the property or exercised any dominion over it for more than eight years prior to the commencement of the action. See

New York Insurance Co. v. Gamer, 303 U. S. 161, 82 L. Ed. 726.

A similar contention was made in the case of

O'Banion v. Simpson, 44 Nev. 188, 191 Pac. 1083,

where the court said:

> "The cultivation, improvement, inclosure, and the pasturage of land not inclosed is, by the distinct affirmation of the statute, evidence of adverse possession, but the statute does not exclude evidence of possession manifested in some other appropriate manner."

Moreover, the applicable statute (Section 8508, Nevada Compiled Laws, 1929) dealing with adverse possession of mining claims contains this provision:

> "* * * All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; * * *."

The boundaries of mining claims are defined by monuments, but no one ever heard of them being protected by substantial enclosures, and it would be indeed strange if they were cultivated or improved in accordance with the usual and ordinary methods of husbandry.

As respects the water line, pipeline and water works, it appears that they were put to the use and placed to the use to which they were adopted. This is sufficient to establish adverse possession. See

Kellogg v. Huffman, 30 Pac. (2d) 593;

Dargan v. Keystone Mills Co., 86 S. W. (2d) 726.

See also

O'Banion v. Simpson, supra.

AS RESPECTS THE CONTENTION THAT THERE WAS NO DISSEIZIN, AND THAT THE TAX DEED WOULD NOT SUPPORT A CLAIM OF ADVERSE POSSESSION.

It is urged that adverse possession cannot be gained where the deed relied upon as color of title is wholly void and not merely voidable. The authorities upon which petitioner relies are cases where the tax deed was void on its face. Here the tax deed, according to the Findings of Fact and stipulation of the parties, was regular in form and in accordance with the statutes of Nevada, and all proceedings, from the assessment by the assessor up to and including the execution of the deed, were regular and in accordance with the statutes and laws of the State of Nevada (R. 166, 167; R. 40, 41).

The order appointing the receiver was something extraneous the tax law, the tax proceedings and the deed. The tax deed, under the authorities, constitutes a good and sufficient color of title on which to base a

claim of adverse possession, even though it be defective and, as said in some cases, even though it be worthless. See

Black on Tax Titles, p. 375;
Pillow v. Roberts, 13 Howard 472, 14 L. Ed. 228.

Moreover, as appears from the Complaint (paragraphs VIII and IX, R. 7, 8), W. F. Roseberry on the 22nd of April, 1930 executed a deed to the land and property here in controversy to Roy F. Roseberry, and the Complaint alleges that Roy F. Roseberry thenceforward wilfully and without warrant of law has remained in and upon the property and claimed to have legal possession thereof, and likewise makes a claim to all of the right, title and estate thereto and therein under and by virtue of said alleged deeds as hereinbefore set forth.

In

O'Banion v. Simpson

the Supreme Court of Nevada said:

> "The argument that the respondents' occupancy and possession of the property is not shown to be hostile to appellant's title is clearly against the weight of the evidence. Entry by a grantee holding under a deed of conveyance for the entire estate, or a specific portion thereof, by metes and bounds, containing covenants of seizin and warranty, made by one of the cotenants and duly placed on record, has all the constituent elements of a disseizin at common law. Co. Litt. b. n. 1.
>
> Such a conveyance as that here in question determines the quo animo with which entry is made under it, and gives character to the possession after entry made. Foulke v. Bond, supra. The

> entry of such grantee cannot be presumed to be that of a cotenant, nor in subordination to the rights of the cotenancy. Every act of ownership on the part of such grantee after entry must necessarily be adverse to any other part owner. His possession under such circumstances is adverse from its inception. Abernathie v. Con. V. M. Co., 16 Nev. 270; Freeman on Cotenancy, sec. 224.
>
> It will not be denied that one of the most effective means of proving ouster is by showing the exercise of dominion over the land by the adverse claimant. 1 R. C. L. sec. 15, p. 703."

We further urge in this respect that the receiver cannot be said at any time to have been seized of the property in controversy, a receiver being merely a custodian for the court and for the benefit of the party ultimately proved to be entitled. See

53 *C. J.* 96, 97, Sec. 119;
53 *C. J.* 93, 94, Sec. 117.

Moreover, with the dismissals of the New York proceedings, the consequent falling of the ancillary proceedings in the Nevada Court and the dismissal in the Nevada Court, and by reason also of the abandonment of the asset, Tuscarora-Nevada Mines Company, and not the receiver, was the only one who could have been seized of the property in controversy.

As to the mining claims and Section 8508 of Nevada Compiled Laws, 1929, we call attention to the construction placed upon that statute by the Circuit Court of Appeals for the Ninth Circuit in

Ralph v. Cole, 249 Fed. 81

(reversed on other grounds), citing with approval the

case of *420 Mining Co. v. Bullion Mining Co.*, 9 Nev. 241:

> "The fact, as found by the court, that the defendant has been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute, claiming title thereto adversely to plaintiff, for more than seven years prior to the commencement of this suit constitutes a complete bar to this action."

AS RESPECTS THE SUFFICIENCY OF THE PLEADING OF THE DEFENSES OF THE STATUTES OF LIMITATIONS AND LACHES.

We urge that the statutes of limitations and laches are affirmatively and fully pleaded by a pleading of the facts (R. 23, paragraph I; R. 24, 25, paragraph I; R. 26, paragraph III).

37 *C. J.* 1219, Sec. 726;

37 *C. J.* 1221, Sec. 728.

In

Huntington v. Huntington, 152 Fed. 240,

the court said:

> " 'Anything in an answer which will apprise the plaintiff that the defendant relies on the statute of limitations is sufficient, if such facts are stated as are necessary to show that the statute is applicable.' "

AS RESPECTS THE APPLICATION OF THE DOCTRINE OF LACHES.

The record shows that the receiver reported that he was unable to protect and preserve the property and

had no funds to pay taxes or to do annual assessment work upon the claims. Under these circumstances and upon his prayer, he was permitted to resign and his sureties were released from liability.

The receiver abandoned the property, and the respondents expended $57,000.00 in caring for and developing the property. While this was being done, neither the receiver nor any creditor or holder of receiver's certificates took any action in connection with the property or asserted or claimed any right, title or possession thereto until the recent increase in the price of gold which gave the claims a value which they did not possess when the receiver abandoned them.

The petition asserts that the respondents have suffered no prejudice. We assert that holding, working, developing and preserving the property in controversy at an expense of $57,000.00 constitute prejudice.

It is also asserted in the petition that "the property has not increased in value, but on the contrary its *assessed valuation* is now less than one-third of what it was at the time defendant Roseberry first went into possession". This is an erroneous statement.

There is very considerable evidence of value other than the assessed value, and ample evidence of enhancement. The Complaint alleges (paragraph XIII, R. 9, 10) that on April 3, 1929 (the date of the resignation of the receiver and exoneration of his bond) the properties in controversy had no ascertainable value which might then be rendered beneficial to the holders of the receiver's certificates. The Complaint thereafter alleges (paragraph XIV, R. 10) that because of

the current increase in the market value of monetary metals which are contained in ores obtainable from said properties, certain persons have recently recognized the possibilities of profitable operation of said mining properties. The Complaint further alleges (paragraph XV, R. 12) that petitioner's investigations have disclosed that the properties have certain values not apparent or discernible at the time of his accounting on June 19, 1917, nor for a long time thereafter, but which have become discernible and which, if converted into liquid assets, will accomplish, in part at least, the discharge and payment of the said outstanding receivership certificates (amounting to in excess of $75,000.00).

The petition for reinstatement made to the Nevada Court alleges that because of the recent increase in the price of gold and silver * * * the possibilities of profitable operations of said mining properties have been foreseen (R. 67), and also alleges that the properties "have certain values which were not apparent or recognized at the time of filing his accounting with the Court on June 19, 1917, but which have since been discovered, and which, if converted into cash, will do much to pay off and discharge the outstanding receiver's certificates" (R. 68).

In the petition for reinstatement addressed to the New York Court, Haskins represented that "all of said properties your petitioner believes are of considerable value", and in this same petition (R. 119) also declares that "because of the recent increase in the price of gold which is reported to exist in the properties referred to, higher returns may be expected,

increasing the possibilities of profitable operation or sale of the properties", and on page 120 of the Record he refers to the property as a valuable asset of the receivership. See also R. 136. See also the amendment to petitioner's Complaint, where it is alleged that the value of the matter in controversy, exclusive of interest and costs * * * exceeds $3000.00 (R. 183, 184), and a similar allegation in respondents' counterclaim that the amount and value in controversy *greatly* exceeds the sum of $3000.00 (paragraph II, R. 25, 26) and this allegation is admitted by the Reply (R. 30).

These facts bring the instant case squarely within the leading case of

Chase v. Chase, 37 Atl. 804.

Moreover, enhancement in value is not an essential condition as respects mining claims, where the doctrine of laches is relentlessly enforced. See

Noble Gold Mines Co. v. Olsen, 57 Nev. 448 at 463, 465, 63 Pac. (2d) 1005.

WHEREFORE, respondents pray that the Petition for a Writ of Certiorari be denied.

Dated, Reno, Nevada,
September 5, 1941.

Respectfully submitted,
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(Appendix Follows.)